

GUSRAE KAPLAN NUSBAUM PLLC
ATTORNEYS AT LAW

120 WALL STREET-25TH FLOOR
NEW YORK, NEW YORK 10005

OF COUNSEL
ROBERT L. BLESSEY

SCOTT H. GOLDSTEIN

MARTIN H. KAPLAN

LAWRENCE G. NUSBAUM

RYAN J. WHALEN

BENJAMIN S. KAPLAN

TEL (212) 269-1400
FAX (212) 809-4147

81 MAIN STREET-SUITE 215
WHITE PLAINS, NEW YORK 10601
(914) 644-8323

www.gusrakaplan.com

July 15, 2019

VIA ECF

The Honorable Gregory H. Woods, United States District Court Judge
United States District Court
Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007

Re: *American E Group LLC v. Livewire Ergogenics, Inc.* No. 1-18-cv-03969 (GHW)

Dear Judge Woods:

We represent Defendant/Counter-Plaintiff/Third-Party Plaintiff Livewire Ergogenics, Inc. (“Livewire”) in the above-captioned action. We are writing pursuant to the Court’s Order dated July 5, 2019, directing the parties to meet and confer regarding the discovery schedule and any outstanding discovery issues in advance of that conference and to submit a joint letter to the Court describing their respective positions. For the reasons set forth below, the parties were unable to agree to a proposed discovery schedule or even stipulate to their respective positions. Livewire apologizes to the Court for being unable to submit a joint letter.

Livewire’s counsel is uncertain of who is acting as counsel for Third Party Defendants Elana Hirsch (“Hirsch”), JS Barkats PLLC (“JSB”) and Sunny Barkats (“Barkats”). Currently, Elana Hirsh is being represented by Dwayne Bentley, Esq. (DE 76) and Ira Thomas, Esq. (DE 131). On June 12, 2019, Attorney Bentley emailed me that he would be filing a motion to withdraw as Hirsch’s counsel. To date, however, no motion to withdraw has been made.

Attorney Jerome Noll appeared in this action on behalf of JSB and Barkats on March 25, 2019. (DE 88 and 89). On May 14, 2019, in response to my request for dates to depose Barkats, Attorney Noll informed me that Barkats is “not presently in the country. However, that should not

GUSRAE KAPLAN NUSBAUM PLLC

be a problem as long as you set deposition dates as far out as possible.” The discussion on scheduling Barkat’s deposition date was adjourned due to the stay in this action. However, since July 5, 2019 when the Court instructed the parties to meet and confer, all of my efforts to communicate with Attorney Noll have been ignored.

On Friday, July 12, 2019, Attorney Thomas, Attorney Paukman¹ and I had a telephone conference to discuss a proposed discovery schedule, including dates for depositions. Attorney Thomas informed me that Hirsch (who is the managing member of Plaintiff, American E Group, LLC) is currently in France and will not be able to return to the United States for her deposition until no earlier than sometime in September 2019.²

Attorney Thomas also advised me that Barkats, who is Hirsch’s husband, is also in France, and he does not know if and/or when he will be traveling back to the United States. Attorney Thomas suggested (despite not being counsel for Barkats) that his deposition proceed via Skype. Livewire does not think this is acceptable for various reasons. Attorney Thomas informed me that he would seek to depose Livewire’s chief executive officer, Bill Hodson and another alleged employee. No dates were discussed, but Attorney Thomas mentioned traveling to California to take Mr. Hodson’s deposition.

Attorney Paukman did not address discovery during the meet and confer, but rather informed me that JSB and Barkats would be moving to dismiss the action pursuant to an agreement to arbitrate in the retainer letter between JSB and Livewire. This issue was addressed in my letter to the Court earlier today. See DE 137. While Livewire believes JSB/Barkat’s motion to dismiss would be meritless, indeed, frivolous, the potential for a motion to dismiss creates further scheduling uncertainty.

I informed counsel for AEG, Hirsch, JSB and Barkats that without knowing when and if Hirsch and Barkats would appear for their depositions, it is difficult to discuss a proposed discovery schedule. This difficulty is only exacerbated due to the lack of responsive documents produced thus far by AEG, Hirsch, JSB and Barkats. As a result, the depositions of Hirsch and Barkats are critical and will likely result in additional discovery requests and subpoenas being issued by Livewire.

Prior to the stay, Livewire did issue a subpoena on Samuel Watkins, Esq., an attorney previously employed by JSB who worked on the loan transaction between AEG and Livewire. Attorney Watkins deposition was adjourned due to the stay, but it is anticipated that the deposition will proceed in short order after the stay is lifted.

Respectfully submitted,

Ryan J. Whalen

¹ Attorney Paukman is co-counsel for JSB and Barkats. See DE 129 and 130.

² Attorney Thomas asked that I not disclose in a public filing the reason for Hirsch’s presence in France. For the moment, I will agree to this request.